

Torts and the Paradox of Conservative Justice: A Response to Avraham and Yuracko

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In response to Ronen Avraham & Kim Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017).

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Professors Avraham and Yuracko’s fine article, *Torts and Discrimination*, calls our attention to a disconcerting and underappreciated aspect of tort law.¹ The entrenched fact of race and gender discrimination exerts a powerful, structural influence on tort damages, especially in bodily injury and wrongful death cases. Damages in tort—and in private law more generally—are reparative. Their role, as Lord Blackburn famously wrote, is to put the plaintiff “in the same position as *he would have been in* if he had not sustained the wrong for which he is now getting his . . . reparation.”² Making the plaintiff whole requires that courts determine how the plaintiff’s life would have gone had she not been wrongly harmed.³ State of the art methods for calculating both “economic and noneconomic damages attributable to past and future harm” incorporate the effects of objectionable racial and gender discrimination and carry their effects forward.⁴ In the name of scientific rigor and accuracy, we use life expectancy, worklife expectancy, and average wage tables to calculate damages.⁵ To be sure, these tables are generic. We cannot know how any particular plaintiff’s life would have gone. However, the guiding aim of putting

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¹ Ronen Avraham & Kim Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017). As they acknowledge, Professors Avraham and Yuracko’s article builds upon the pioneering work of Martha Chamallas and Jennifer Wiggins. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010).

² *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25 (HL) 39 (appeal taken from Scot.) (emphasis added). This ideal is often called by its Latin name: *restitutio in integrum*.

³ Avraham & Yuracko, *supra* note 1, at 664.

⁴ *Id.* at 665–66.

⁵ *Id.*

the plaintiff in the position that he would have been in but for the wrong calls for using more particular tables, when more particular tables are available.⁶ The more that these tables are tailored to the circumstances of men and Caucasians, the more they reflect the legacy of long-term race and gender discrimination. The more precisely the tables reflect that legacy of discrimination, the more they project past discrimination forward.

Like a Gordian knot, this problem is difficult to untangle, but easy to cut through. We might end this practice of projecting past discrimination forward by using blended life expectancy, worklife expectancy, and average wage expectancy tables, instead of tailored ones. Administratively, this is a simple change. Judges have the authority to require the use of blended tables and the tables are there for the using. The hard questions that this remedy raises are not practical or administrative, but theoretical and normative. Why is tort law drawn to project past discrimination forward? And how deeply embedded, normatively, is its commitment to doing so? My inclination is to think that the feature of tort law at work is basic, but not backed by immense normative weight. The feature at issue is central to the law of torts because reparation is central to tort, and the use of tailored tables furthers reparation. However, reparation mechanisms that undermine equal rights themselves offend important tort values. Or so I shall suggest.

As John Gardner and others have argued, the objective of tort damages is not to restore a prior point in time, but to recover a particular narrative arc.⁷ Repair and restoration are two different activities.⁸ When we *restore* a car we return it to its original condition, even if that original condition includes an inferior component, or a design that has subsequently been shown to be flawed. When we *repair* a car, we return it to a well-functioning condition; we get it back on the road. When we repair a car, we are happy to eliminate an original defect, or to improve upon a flawed design.⁹ Lives are not cars, but the distinction between restoration and repair holds nonetheless. Tort damages are not about restoring a prior situation as perfectly as we can; their point, rather, is to get a life back on its pre-existing *narrative arc* as best we can.¹⁰ This feature of tort law—and of private law more generally—cuts quite deep. Private law takes the life that the plaintiff had at the time she was wronged as the life to which she was entitled. Tort law in particular confers security. When an interest—in physical integrity, in privacy, in an established contractual arrangement—is deemed worthy of protection by tort, it is secured against

⁶ See *id.* at 666 (“Traditionally, courts have accepted as evidence life expectancy, work life expectancy, and average income values particularized to the plaintiff’s gender and, where available, race.”).

⁷ See generally JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW (forthcoming 2018) (manuscript ch. 5, at 9) (on file with Ohio State Law Journal).

⁸ ELIZABETH V. SPELMAN, REPAIR: THE IMPULSE TO RESTORE IN A FRAGILE WORLD (2002) nicely develops the distinctions between repair and restoration.

⁹ *Id.* at 9–25.

¹⁰ GARDNER, *supra* note 7 (manuscript ch. 5, at 9).

impairment. Tort law thus confers protection on lives and possessions as they are. And when they are wrongly impaired, it tries to get them back on the track that they were on. It protects existing value. The problem at hand, of course, is that the protection and repair of existing life projects past injustice forward.

The most perspicuous way to conceive of the predicament at issue is as a particular manifestation of a pervasive dilemma. The phenomenon to which Professors Avraham and Yuracko are calling our attention is an instantiation of Sidgwick's "paradox of conservative justice."¹¹ In *The Methods of Ethics*, Henry Sidgwick asked whether otherwise just and desirable political reforms could be legitimately resisted on the ground that their implementation would upset expectations grounded in existing institutions and the supposition that these institutions would continue to exist.¹² In the circumstance Sidgwick is contemplating, ideal justice requires reform, but conservative justice requires respect for the reasonable expectations to which existing institutions and entitlements give rise.¹³ The result is a moral dilemma, and a pervasive one:

Every reform of an imperfect practice or [an unjust] institution is likely to be unfair to someone or other. To change the rules in the middle of the game, even when those rules were not altogether fair, will disappoint the honest expectations of those whose prior commitments and life plans were made in genuine reliance on the continuance of the old rules.¹⁴

We have *prima facie* obligations *both* to reform unjust institutions *and* to honor the reasonable expectations to which existing institutions give rise. When these obligations conflict—as they commonly do—we cannot fully discharge both obligations. Theory can help to illuminate our predicament, but the resolution of any particular predicament requires a context-sensitive judgment. We must balance the injustice of the existing institutions against the extent of justified reliance upon those institutions. However we strike this balance, we are likely to treat someone unfairly.

I. CORRECTIVE JUSTICE

Three perspectives on the predicament at hand come readily to mind. One of these might be called the perspective of strict corrective justice. On this view, tort law seeks only to do justice between the parties to a particular tortious

¹¹ HENRY SIDGWICK, *THE METHODS OF ETHICS* bk. III, ch. V (Hackett Publ'g Co., 7th ed. 1981) (1907).

¹² *Id.* at 271–74, 293–94. For a discussion of “the dilemma of conservative justice,” see JUHA RÄIKKÄ, *SOCIAL JUSTICE IN PRACTICE: QUESTIONS IN ETHICS AND POLITICAL PHILOSOPHY* ch. 2 (2014). For related discussions, see also JOEL FEINBERG, *Duty and Obligation in the Non-Ideal World*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 252, 252–64 (1980), and JOHN RAWLS, *A THEORY OF JUSTICE* 212–13, 308–12 (rev. ed. 1999).

¹³ See SIDGWICK, *supra* note 11, at 271–74, 293–94.

¹⁴ FEINBERG, *supra* note 12, at 257.

wrong. It excludes all other considerations.¹⁵ Arguably, this position calls for ignoring the fact that our best efforts to restore wronged victims to the lives they would otherwise have led will entrench social injustices. Racial and gender discrimination are systemic wrongs. Repairing pervasive social injustices is not the responsibility of the law of torts. The rectification of such injustices is the task of public law, or perhaps of society at large. Tort law's task is to do justice between the parties. It would be both a perversion of tort law's role to pursue social justice at the expense of corrective justice, and a wrong to the party whose right had been violated to compromise his right to reparation in the name of social justice. We would be sacrificing him as a means to a socially desirable end. The burden of repairing widespread social injustice should be shared widely, not imposed on those unfortunate enough to be wrongly harmed.

To be sure, there is room for disagreement over whether corrective justice theorists are committed to this interpretation of what justice demands. Perhaps they can embrace the suggestion that tort law's constitutive commitment to being a regime of equal right enables it to support purging our methods of computing damages of the effects of objectionable racial and gender discrimination, even when doing so departs from the precept of putting the victim in the position that he would have been but for the wrong committed against him. Supposing, however, that strict corrective justice theorists *are* committed to insisting that justice between the parties—and *only* justice between the parties—be done, there is something implausible about the claim that the *form* of tort law by itself establishes the absolute priority of the claims of conservative justice over the claims of ideal justice. Just how to weigh the conflicting claims of corrective justice strictly construed and social justice is a substantive question, not a formal one, and a highly contextual question at that. The only way to fix the weights of these two competing forms of justice is by evaluating as best we can the considerations that bear on them in the context at hand.

II. EFFICIENCY AND EQUALITY

Conventional law and economics provides a second perspective. *Torts and Discrimination* plumbs this perspective at considerable depth, and Avraham and Yuracko work hard to bring law and economics in line with the cause of social

¹⁵ Ernest Weinrib's work is often associated with this position. *See generally* ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995). ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016) also comes to mind. I suspect that both views leave room for argument over how to respond to the dilemma that Professors Avraham and Yuracko identify because they take equal rights as their fundamental value. I shall not try to puzzle out just how they might avoid the position described in the text. Instead, I shall state the hard-edged position that corrective justice appears to imply. At the very least, the hard-edged position fleshes out a plausible case for leaving our practices just as they are, even if those practices further racial and gender injustice.

reform.¹⁶ Their article attempts to defend the obvious claim that discrimination is wrong within the four corners of the law and economics framework.¹⁷ This is understandable and admirable, given the influence and importance of law and economics, but it brings two problems in tow. First, law and economics makes use of modified Pareto criteria. It accepts existing entitlements as the baseline against which changes are measured, and it pursues changes that make at least one person better off without making anyone worse off.¹⁸ In this context, the implications of a stringently Paretian position are troubling. When people's lives, possessions and reasonable expectations reflect the effects of pervasive racial and gender discrimination, such discrimination is baked into the baseline against which changes are measured.¹⁹ Sidgwick's "paradox of conservative justice" rears its head once again.²⁰ Entitlements that are the product of injustice are accepted as sacrosanct, and changes that repair injustices embedded in those entitlements are ruled out. Only changes that make no one worse off are Pareto improvements.²¹ Righting the past wrongs of discrimination by purging damage tables of the effects of past discrimination takes something away from those who have benefitted from wrongful discrimination. Just reform makes the beneficiaries of past injustice worse off. If this is to be done it should be done by some society-wide institutional mechanism—by the tax system, not by the law of torts.²²

Second, orthodox law and economics is welfarist.²³ It takes welfare to be the only and master value. Other goods are valuable only insofar as they

¹⁶ Avraham & Yuracko, *supra* note 1, pt. IV.C.

¹⁷ *Id.*

¹⁸ Usually, law and economics uses the Kaldor-Hicks or potential Pareto superiority criterion. The potential Pareto superiority criterion allows changes which make some people worse off as long as those who are made better off are made sufficiently better off that they would be able to compensate those who are made worse off. This criterion preserves the existing distribution of entitlements as the baseline from which changes are evaluated, but permits changes that make some people worse off. For explanation and discussion of the Pareto and Kaldor-Hicks criteria, see JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 97–105 (1988). See also A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7 & n.4 (4th ed. 2011) (relating Pareto criteria to the basic idea behind the concept of efficiency—the idea of maximizing “the size of the pie”); Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817, 827–29 (1989) (identifying cost-benefit analysis as a technique for applying Pareto efficiency criteria). It is difficult to know how to apply this criterion to changes which make the world more just. For example, does giving women the vote make them sufficiently better off that they would be able to compensate men who are made worse off? Does giving women the vote actually make men worse off? This Response will ignore these difficult questions and work with the roughly true assumption that people's existing entitlements are the starting point for economic analysis.

¹⁹ See FEINBERG, *supra* note 12, at 257.

²⁰ See *supra* notes 11–13 and accompanying text.

²¹ See the sources cited *supra* note 18.

²² See Avraham & Yuracko, *supra* note 1, at 699 n.215.

²³ *Id.* pt. IV, especially text accompanying note 281.

contribute to welfare. This commitment to welfarism creates further difficulties. The wrong of racial and gender discrimination offends equality. Morally speaking, all competent, adult human beings are equals. Their moral equality should be reflected by equality of legal rights. Race and gender discrimination wrongly deny this equality. The idea that people are moral and political equals and should be treated accordingly is, however, hard to incorporate into a welfarist framework. Equality is itself a value—something worth realizing for its own sake. Welfarism denies this.²⁴ It asserts that welfare is the only value; everything else is valuable only insofar as it promotes welfare.²⁵ To work around this denial, Avraham and Yuracko posit that people's own welfare functions incorporate a preference for equality.²⁶

Within the framework of welfare economics, however, whether people's welfare functions do or do not incorporate a preference for equality is a contingent matter.²⁷ Self-interested rational egoists might prefer that everyone be treated as moral equals, and they might not. But even if self-interested rational egoists do *happen* to have preferences for equality, this way of expressing the value of equality misses the moral point. The moral point is that people *are* equals. The equality of persons *obligates* us: we are all morally required to accord others the equal consideration, respect, and treatment owed our moral, legal, and political equals. So doing may or may not promote our own well-being. Whether or not it does is beside the point. We are duty-bound to treat others as our equals even if (or when) so doing does not promote our own well-being. Obligation and welfare are different dimensions of value. Something of fundamental importance is lost when an obligation is re-conceptualized as an aspect of welfare.

III. EQUAL RIGHT AND REMEDIAL RESPONSIBILITY IN TORT

A third way to think about the matter at hand is to ask what place equality has in tort law, and how equality's place in tort law bears on the dilemma that Avraham and Yuracko identify. Implicitly, Avraham and Yuracko appeal to the importance of equality when they point out the disturbing implications of our damage calculation practices on the safety of rich and poor, men and women, white and black:

²⁴ See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 18–28 (1st Harvard Univ. Press paperback ed. 2006).

²⁵ *Id.* at 24–28.

²⁶ Avraham & Yuracko, *supra* note 1, pt. IV.

²⁷ Empirically, it is all too clear that people may have objectionable preferences, including inequality, bigotry, and malevolence. Theoretically, the default position in welfare economics is that all preferences count. There is no logical reason why people cannot find pleasure in the satisfaction of morally objectionable preferences. For an exposition of this view, see KAPLOW & SHAVELL, *supra* note 24, at 409–31.

The fact that courts presumably apply the same standard of care across all neighborhoods regardless of the racial or socioeconomic composition of their residents might promote the misconception that race and gender do not matter. That, of course, is a mistake: race and gender in fact play a crucial role in the calculation of damages, and therefore in potential tortfeasors' precaution decisions. . . . Since blacks and women in the United States earn less than whites and men, respectively, the damages black women receive for future losses caused by bodily injury or wrongful death are lower than the damages their white male counterparts would receive. The disadvantage blacks and women suffer in the United States, in terms of their job market prospects, are reflected in the level of tort damages they receive.

The conclusion is unavoidable: it is less costly for [a company such as PhedEx] to have accidents involving blacks (especially females) than whites (especially males).²⁸

We should be disturbed by this outcome not just because *we* value equality, but *because tort law itself* asserts that people have *equal rights to safety and due care*. Equality of legal rights is a constitutive commitment of a liberal democratic legal system. Yet, tort law undercuts its own commitment to equality of right by computing damages in ways that reflect not only income and wealth but also race and gender. The result is a system that incentivizes harming those who are less privileged—a system that denies the equality that tort formally promises.

What should we make of a circumstance where remedy undermines equal right in this way? To answer that question, we must step back and gain a bit of perspective on tort law. Obligations imposed by law to conduct oneself in various ways with respect to other people are a necessary part of any legal system. When people go about their lives in civil society, their ordinary interactions inevitably bring them into conflict with one another. Accidents are the byproduct of productive activity and they are not wholly avoidable. Tort law, or its equivalent, must exist because these interactions must be governed. Next, we need to recognize that tort law is a matter of obligation and that remedial responsibilities in tort law are secondary, not primary. Remedial responsibilities arise out of failures to discharge antecedent responsibilities to respect various rights and to avoid the infliction of various harms on other persons.²⁹ Tort law is a law of wrongs, not just a law of redress for wrongs. In

²⁸ Avraham & Yuracko, *supra* note 1, at 664 (footnotes omitted). This example opens the article.

²⁹ The distinction between primary and remedial legal norms bears on tort in a particular form, but it is a general distinction. Henry M. Hart, Jr. and Albert M. Sacks explain the general distinction in the following way:

Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully. This is the primary purpose of the arrangement, and the provisions which describe what this purpose is are the *primary provisions*.

the first instance, the law of torts enjoins respect for a set of equal rights that people have against one another just in virtue of their standing as members of civil society. Tort law obligations are owed by members of civil society to one another in virtue of every citizen's standing as an equal person. Logically and normatively, secondary obligations of repair are dependent on primary obligations of respect.³⁰

Logically, remedial responsibilities are conditioned on, and arise out of, failures to discharge primary ones.³¹ Normatively, primary responsibilities provide the reason for honoring remedial responsibilities and largely determine the shape of remedial responsibilities.³² Breaching primary responsibilities leaves those responsibilities undischarged and puts the breaching party in a position where it is no longer able to discharge its primary responsibilities in the best way possible.³³ Repairing wrongful harm is the next best way of complying with an obligation not to do harm wrongly in the first place.³⁴ Rights and remedies form a unity in which rights have priority because the role of remedial responsibility is to enforce the plaintiff's right and to repair the harm done by its violation.³⁵ The consequence of the facts that remedial responsibilities are subordinate to primary ones while primary responsibilities are matters of equal right is that tort remedies ought to support—not undermine—equality of primary right. And the practices of relying on life expectancy, worklife expectancy, and average wage tables that Avraham and Yuracko describe undermine equality of right.³⁶

Taking equal right—and therefore equal *obligation*—seriously leads us to reframe Avraham's and Yuracko's account of the PhedEx case. Avraham and Yuracko are right to observe that it is rational for PhedEx to route its trucks through poor, nonwhite neighborhoods. The practice is rational because it responds intelligently to the message of the tort system understood as a pricing mechanism and promotes PhedEx's self-interest in minimizing the costs of its activities. But that practice is also unreasonable.³⁷ Rational practices are

Every arrangement, however, must contemplate also the possibility that on occasion its directions will not be complied with. . . . The provisions of an arrangement which tell what happens in the event of noncompliance or other deviation may be called the *remedial provisions*.

HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 122 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

³⁰ See Gregory C. Keating, *The Priority of Respect over Repair*, 18 *LEGAL THEORY* 293, 308–10 (2012).

³¹ *Id.* at 308.

³² *Id.* at 309.

³³ *Id.* at 309–10.

³⁴ *Id.* at 310.

³⁵ *Id.*

³⁶ See Avraham & Yuracko, *supra* note 1, at 665–66.

³⁷ See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 311, 311–12 (1996).

justifiable from the point of view of those whose interests they advance.³⁸ Reasonable practices are justifiable to those they disadvantage, as well as to those who benefit from them.³⁹ PhedEx's practice is unreasonable because it is not justifiable to those whose lives it sacrifices for cost-minimization. The first reason why this is the case is that PhedEx's practice undermines the obligation to treat everyone's safety as equally valuable. This commitment is fundamental to tort law. Those whose lives are devalued and endangered by PhedEx's practice also have good reason to object to a remedial practice—a method of computing damages—that both devalues their lives and subjects them to an unjustified increased risk of harm. Tort law's method of computing damages subverts equality both expressively and instrumentally. Last but not least, this criticism may be voiced as an internal criticism of tort law. The way in which remedies are articulated undermines equality of primary right. In economic terms, we have an incentive-compatibility problem.⁴⁰ In tort law terms, we have an internal contradiction. The incentives provided by tort damages undermine tort law's commitment to equality of right, instead of supporting that commitment. Insofar as tort remedies exist to support rights, this is an internal defect in tort law's institutional design, and an internal reason to reform tort law.

The dissonance between rights and remedies might be rectified in diverse ways. For example, we might impose punitive damages on firms that act as PhedEx does in Avraham and Yuracko's example. Or we might enjoin practices such as PhedEx's. I want to set these possible remedies aside, however, to confront the question that Avraham and Yuracko pose: should we change the way in which we compute tort damages?⁴¹ And if we should, to what extent can we square doing so with the normative commitments of tort law itself? When we consider this reform measure, we return our attention to the fact that tort damages are reparative. They aim to put the victims of tortious wrongs in the positions that they would have occupied had they not been wronged.⁴² Victims who are white and/or male will have been benefitting, *de facto*, from the effects of past (and present) discrimination. Using tailored tables tracks this fact, objectionable as it is. But using tailored tables also undermines equality of primary rights. Using blended tables, by contrast, brings tort remedies in line with tort law's commitment to equality of primary rights and mitigates the effects of entrenched discrimination. But it does so by rendering less perfect corrective justice. By design, blended tables restore victims of tortious wrongdoing who have benefitted from wrongful discrimination to less of what they once had than do tables that do not seek to remedy the effects of such discrimination.

³⁸ *Id.* at 312.

³⁹ *Id.*

⁴⁰ See generally John O. Ledyard, *Incentive Compatibility and Incomplete Information*, 18 J. ECON. THEORY 171 (1978).

⁴¹ See generally Avraham & Yuracko, *supra* note 1.

⁴² MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 14 (9th ed. 2011).

We have, then, a particular instantiation of the “paradox of conservative justice.” Tailored tables restore victims more exactly to the condition that was wrongly taken away from them; blended tables deliver a more just world.

A. The Reliance Interests of Potential Victims

When we struggle with how to resolve this conflict between the claims of the world as it is and the claims of the world as it ought to be, the question of justified reliance comes to the fore. The strength of claims grounded in existing imperfect institutions depends very much on how much—and how justifiably—those institutions have been relied upon. In theory, both potential victims and potential injurers might rely on our present practices of damage computation and be both surprised and disadvantaged by the reform of those practices.

The reliance interests of potential tort victims appear to be quite weak. It attempts to secure people against various forms of harm and certain violations of their rights. Especially when the harm against which tort law secures people is accidentally inflicted, tort law does not invite extensive reliance on the part of those it protects. Tort is not tax. Many people do plan their financial affairs on the basis of tax considerations. In so doing, they have little choice but to rely on the tax law in effect at the time of their planning.⁴³ By contrast, the law of tort damages as it now exists does not generally induce reliance on the part of prospective victims of tortious wrongs. People don’t plan their walks across the street or their choices of residential neighborhood on the basis of their understanding of the damages to which they will be entitled if they are hit by a PhedEx Truck while out for a stroll. Normal people do not plan on suffering accidental injury because, say, it’s worth doing for the damage judgment. Accidental injury, moreover, is not the sort of thing you can plan on suffering in a straightforward way.⁴⁴

Consequently, the only plausible forms of victim reliance on tort damage practices as they presently exist are second-order. One might, for example, purchase first-party loss insurance against accidental injury, or against some broader class of losses that encompasses the costs of accidental injury.⁴⁵ Such insurance might replace or supplement any tort damages one might receive in connection with suffering some covered injury. First-party loss insurance does exist, and it is often meshed with tort damages through the workings of the

⁴³ To be sure, it is possible to plan for some contingencies, including changes in the law, but this is the exception not the rule.

⁴⁴ We might imagine that a more egalitarian law of torts would compensate high-income and high-wealth victims less generously than our present system does. If such a body of law were to develop, it would be desirable for potential victims to purchase additional insurance to replace income and wealth not covered by tort damages. Such insurance would increase the attractiveness of a more egalitarian system of tort damages.

⁴⁵ Most people have some such insurance in the form of health insurance. For most of us, health insurance is an employer-provided employment benefit. Neither the amount nor the cost of such insurance is tailored to the details of tort damages.

collateral source rule.⁴⁶ It seems quite unlikely, however, that such insurance is tailored and priced precisely to the details of tort damages. It is therefore difficult to see how a change to blended tables would seriously and systematically disadvantage any insureds even if the change catches them unaware. Any reliance interest that might exist is faint and attenuated at best. In short, it seems that the reliance interests of prospective victims on our present practices of computing damages do not look strong enough to make out a compelling case against changing our tort damage practices in order to cleanse them of the effects of wrongful discrimination.

B. *The Reliance Interests of Potential Injurers*

What about the reliance interests of prospective injurers? In Professors Avraham and Yuracko's article, prospective injurers rely on our present gendered and racist practices of computing tort damages.⁴⁷ PhedEx plans its conduct around the practice of tort damages as it now exists. Its reliance, though, is very weakly justified, if it is justified at all. PhedEx is gaming the system in a way that undermines tort law's integrity and thwarts its commitment to equality of primary rights. This makes a difference. A player or a team that exploits a loophole in the rules of the game generally cannot complain when that loophole is closed. A player or a team whose conduct cleverly evades the rules of the game is in an even weaker position. Such conduct violates the duty of fair play and borders on bad faith.⁴⁸ PhedEx is in just that kind of position. Its practice of routing its trucks through poorer, less white neighborhoods treats its legal obligations as mere prices.

Because it is gaming the law of torts in a way, which at least borders on bad faith, PhedEx cannot claim strong reliance interests in the continuation of the practices whose weaknesses it exploits. Indeed, there is at least *prima facie* reason to think that PhedEx's practices open it up to the possibility of punitive damages. Not only do those practices discriminate wrongly against some people, they also expose those people to unjustified increased risks of harm, and deliberately so. PhedEx's behavior is a subversive attempt to evade its legal obligations. And the obligations that it is attempting to evade are obligations owed directly to other people. Tort is not tax. Shirking one's tax obligations

⁴⁶ See RESTATEMENT (SECOND) OF TORTS § 920A (AM. LAW INST. 1979) (stating that the collateral source rule provides that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable"). The rule has undergone substantial and controversial erosion over the past generation. For a general discussion, see Lori A. Roberts, *Rhetoric, Reality, and the Wrongful Abrogation of the Collateral Source Rule in Personal Injury Cases*, 31 REV. LITIG. 99 (2012). See also Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 THEORETICAL INQUIRIES L. 165, 172–73 (2008).

⁴⁷ See generally Avraham & Yuracko, *supra* note 1.

⁴⁸ See generally JOHN RAWLS, *Legal Obligation and the Duty of Fair Play* (1964), reprinted in JOHN RAWLS: COLLECTED PAPERS 117 (Samuel Freeman ed., 1999).

involves failing to shoulder one's fair share of the costs of government. It does not involve direct wrongdoing to others. Shirking one's tort obligations in the way that PhedEx does involves mistreating other people by failing to accord proper weight to the physical integrity of their persons. The wrong of failing to respect the rights of others to the physical integrity of their persons is different in kind from the wrong of failing to do one's part to uphold a public institution. Avoiding one's tort obligations unjustifiably endangers some people because they are poor, black, or otherwise disadvantaged. Punitive damages are at least plausible. The lesson here, for our purposes, is that the conscious commission of a wrong does not create a compelling bootstrap case for continuation of the practice whose flaws enable the commission of that wrong. If anything, PhedEx's conduct cuts the other way; it augments the case for reform and underscores its urgency.

The only plausible complaint of "conservative justice" that I can see is the complaint that white people and men who suffer tortiously inflicted harms might have. They will be made worse off by a shift to blended tables, and they may object that they are being unfairly singled out to bear the costs of rectifying systemic gender and race discrimination. The factual predicate of this claim seems correct: only white people and men who are tortiously injured will bear this particular cost of rectifying systemic injustice. Even so, it is hard to say just how strong this objection is. For one thing, it may be that the rectification of systemic injustices is often best accomplished by innumerable local changes, all of which fall on different groups of people. When that happens, the distributive injustice of singling some out to bear more than their fair share of the costs of rectification does not exist. There is, of course, no way of knowing if others are bearing the costs of local reforms similar to those that white and male victims of tortious wrongs will bear if tailored tables are replaced by blended ones. At best, we can only guess.

Additionally, the injustice of bearing more than one's fair share of the cost of justified reform has to be compared to the injustice of continuing an unjust practice. Continuing the unjust practice may well be the lesser injustice. This is the kind of "all things considered" judgment we must make when we confront questions of non-ideal justice. My own inclination is to think that, in this case, continuing the unjust practice is the greater wrong. On the one hand, discrimination is a serious wrong and equality of right is an important good. On the other hand, the claim that one should be put back on the track of one's prior life insofar as it was advantaged by past discrimination is problematic. The case that one justifiably relied on the continuation of wrongful discrimination is weak both because the discrimination was wrongful and because it is difficult to rely on the details of tort law practices for computing damages.

Still, changes that make some people worse off and explicitly so are usually politically unattractive. Those who are made worse off may perceive themselves to be punished for past wrongs in which they had no part and for which they bear no responsibility. This possibility points up the attractiveness of Professors Chamallas and Wriggins' proposal to rectify the injustice of past discrimination

by levelling up, not down.⁴⁹ We might, that is, give everyone damages based on the tables now used for white men. This option eliminates the cross-subsidization of everyone else by injured white men and replaces that cross-subsidization with an upward adjustment in prices and services. That upward adjustment will reflect the increased cost of liability in a damages regime that levels up. Importantly, it will also distribute the costs of rectifying past unjust discrimination across all customers of the goods and services affected by the reform. That distribution is attractive because it is broader. Because it is broader, it is fairer in two ways. First, it does *not* single out white male victims for bearing the costs of social justice. Second, it does distribute the costs of achieving a more just world across a larger portion of society. These two effects are, of course, flip sides of the same coin.

My own view is that either leveling up or leveling down are justifiable reforms that judges may legitimately institute by virtue of their discretionary authority over our practices of calculating damages. I can, however, claim no special authority for my opinion that rejecting the use of tailored tables and adopting the use of blended ones is at least the lesser injustice. Nor can I claim special authority for my view that over-deterrence should worry us less than under-deterrence, though I believe that I can give reasons for both positions. Theory can clarify the considerations at stake, but we must all decide for ourselves how to evaluate the competing considerations that theory identifies and clarifies. In coming to our conclusions about what should be done, we each and all have only the standing of equal, democratic citizens. Judges, for their part, do have a special authority. The standard understanding of their role grants them discretion to revise the computation of tort damages to purge that practice of gender and racial bias if they so decide. All that they owe the rest of us is a reasoned explanation of their decision. Professors Avraham and Yuracko are to be commended for opening our eyes to the injustice that tort law is perpetuating and for delving so deeply into its dimensions.

⁴⁹ See CHAMALLAS & WRIGGINS, *supra* note 1, at 158–70. Professors Avraham and Yuracko reject this proposal because they believe that it will lead to overdeterrence. See Avraham & Yuracko, *supra* note 1, at 726. How much weight one puts on that objection depends significantly on how persuaded one is by the economic analysis of tort.